IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	DIVISION ONE
	)	
Respondent,	)	No. 62916-6-I
	)	
v.	)	
	)	
SYLVESTER L. CARTER, JR.,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 19, 2010
	)	

Dwyer, C.J. — Sylvester L. Carter, Jr. appeals from the judgment entered on a jury's verdict finding him guilty of felony violation of a court order. On appeal, Carter claims that there was insufficient evidence introduced at trial to support his conviction, that the information filed as a charging document was incomplete, and that he was denied the effective assistance of counsel. Finding no error, we affirm.

I

On November 21, 2006, the King County District Court issued a domestic violence no-contact order pursuant to RCW 10.99.050[1] (the 2006 no-contact

[1] The statute reads, in pertinent part:

> (1) When a defendant is found guilty of a crime and a condition of the sentence restricts the defendant's ability to have contact with the victim, such condition shall be recorded and a written certified copy of that order shall be provided to the victim.
>
> (2)(a) Willful violation of a court order issued under this section is punishable under RCW 26.50.110.
>
> (b) The written order shall contain the court's directives and shall bear the legend: Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony.

RCW 10.99.050.

order), prohibiting Sylvester L. Carter, Jr. from contacting his ex-girlfriend, Michelle Baker, or coming within 500 feet of her or of her residence. The terms of the 2006 no-contact order specified that it would remain in effect until November 21, 2008 and that Carter had sole responsibility to avoid violating the order's provisions. Carter signed the order.

On the night of July 8, 2008, Carter drove his car to Baker's residence, which was located in the city of Bellevue, and parked in front of Baker's home. When Carter arrived, Baker was standing in front of her residence talking to her friend, Richard David. Carter contacted Baker from his vehicle, spoke to her briefly from his car after she approached him, and then departed. After Carter had driven away from Baker's residence, David reported the incident to Bellevue Police Officer Casey Hiam. Later that night, Officer Hiam interviewed Baker at her residence.

The following day, Bellevue Police Detective Sarah Finkel continued the investigation begun by Officer Hiam. She placed a telephone call to Carter, who admitted during the conversation to having driven to Baker's residence on the previous night but claimed he did so only to check on the whereabouts of his daughter who had run away from his home. Finkel subsequently arrested Carter.

By amended information, the State charged Carter with one count of "Domestic Violence Felony Violation of a Court Order," in violation of RCW

26.50.110(1) and (5).[2] In the charging document, the State specifically alleged that, on July 8, 2008, Carter violated the 2006 no-contact order issued "pursuant to RCW chapter 10.99, for the protection of Michelle Baker." By itself, violation of a no-contact order issued under certain statutes—chapters 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW—is a gross misdemeanor. See RCW 26.50.110(1). However, pursuant to RCW 26.50.110(5), violation of a no-contact order issued under those same statutes constitutes a class C felony if the offender has at least two previous convictions for violating no-contact orders issued under the same listed statutes (previous qualifying convictions). Thus, an individual who repeatedly violates no-contact orders issued under the listed statutes may be subject to prosecution for a felony offense. In the amended

[2] RCW 26.50.110 establishes penalties for violation of a no-contact order issued pursuant to certain statutes. It reads, in pertinent part:

> (1)(a) Whenever an order is granted under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section:
>
> (i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party;
>
> (ii) A provision excluding the person from a residence, workplace, school, or day care;
>
> (iii) A provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location.
>
> . . .
>
> (5) A violation of a court order issued under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

information filed herein, the State alleged that Carter had at least two previous qualifying convictions.[3]

At trial, the State introduced multiple exhibits into evidence. To establish that Carter had violated the 2006 no-contact order, it introduced the no-contact order itself. To establish that Carter had two previous qualifying convictions, the State introduced two judgment and sentence forms: (1) a November 3, 1997 judgment and sentence form (the 1997 form) entered by the King County Superior Court and (2) a September 16, 1996 judgment and sentence form (the 1996 form), which was also entered by the King County Superior Court. Carter did not object to the admissibility of these three exhibits.[4] Similarly, he did not

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[3] The amended information reads as follows:

> I, Daniel T. Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse SYLVESTER L. CARTER, JR. of the crime of Domestic Violence Felony Violation of a Court Order, committed as follows:
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> That the defendant SYLVESTER L. CARTER, JR. in King County, Washington, on or about July 8, 2008, did know of and willfully violate the terms of a court order issued on November 21, 2006, by the King County District Court, pursuant to RCW chapter 10.99, for the protection of Michelle Baker, and at the time of the above violation did have at least two prior convictions for violating the provisions of an order issued under RCW chapter 10.99, 26.50, 26.09, 26.10, 26.26, 74.34 or a valid foreign protection order as defined in RCW 26.52.020;
>
> Contrary to RCW 26.50.110(1), (4), and (5), and against the peace and dignity of the State of Washington.

The original information charged Carter with having assaulted Baker when he committed the July 8 violation. The State deleted the assault allegation in the amended information. Inexplicably, however, the State did not also delete the charge that Baker had violated RCW 26.50.110(4), which makes any assault that is a violation of certain no-contact orders a felony.

[4] The following exchange took place between the trial court, the prosecutor, and defense counsel on the State's motion to introduce the 1997 and 1996 forms, which were respectively marked as exhibits 6 and 7:

> THE COURT: . . . And counsel, are you ready to proceed?
>
> [DEFENSE COUNSEL]: We are.
>
> [THE PROSECUTOR]: There's —
>
> THE COURT: Yes, we're going to bring our jurors out for purposes of opening statements and —
>
> [DEFENSE COUNSEL]: We have a preliminary matter.
>
> THE COURT: Oh, you do? All right, what is that?

seek to redact any information contained therein. The trial court admitted the exhibits into evidence.

The 1997 form indicates that Carter was convicted of "FELONY VIOLATION OF A COURT ORDER" and cites to RCW 10.99.050 as the statutory basis for the conviction. As explained above, a conviction of violating a no-contact order issued under RCW 10.99.050 constitutes a conviction that could qualify an offender for felony prosecution. The 1997 form also contains a table summarizing Carter's criminal history. The table includes the following notations: (a) a 1991 conviction for "Robbery 1°"; (b) a 1991 conviction for "VUCSA—Del."; (c) a 1991 conviction for "Theft 2°"; and (d) a 1996 conviction for "FVNCO." Each of these notations is accompanied by a corresponding

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> [THE PROSECUTOR]: Just with regard to [the] pre-admission of the State's exhibits, they've been marked one through seven.
> THE COURT: All right.
> [THE PROSECUTOR]: I don't know if counsel has any objection to pre-admitting. It was his suggestion.
> THE COURT: Mr. Felker [defense counsel].
> [DEFENSE COUNSEL]: I do not have any objection to State's exhibits 1 —
> THE COURT: Through seven?
> [DEFENSE COUNSEL]: —through seven.
> THE COURT: All right, thank you. All right, anything else?
> [THE PROSECUTOR]: No, your Honor.
> [DEFENSE COUNSEL]: No, your Honor.
> THE COURT: All right.
> [DEFENSE COUNSEL]: We're ready to proceed.

Moments later, the parties and the trial court clarified that the State's exhibits were to be admitted into evidence:

> [THE PROSECUTOR]: And just because I don't know if the Court actually said the magic words, the State would offer what have previously been marked as exhibits 1 through 7.
> THE CLERK: (Nodding head).
> [DEFENSE COUNSEL]: No objection, your Honor.
> THE COURT: I'll grant your motion to admit one through seven.

cause number.

The 1996 form indicates that Carter was convicted of "VIOLATION OF POST SENTENCE COURT ORDER" and cites to RCW 9A.36.041 as the statutory basis for the conviction. That statutory provision pertains to the offense of assault in the fourth degree.[5] A conviction for violating RCW 9A.36.041 does not constitute a previous conviction that could qualify an individual for prosecution of the enhanced crime of felony violation of a no-contact order pursuant to RCW 26.50.110(5). The 1996 form also indicates that the trial court had dismissed a second, unspecified count. It does not contain any other description of the crime of conviction. However, the 1996 form does bear the same cause number as that listed for the 1996 "FVNCO" conviction listed in the criminal history table included in the 1997 form.

The State called three witnesses at trial: Richard David, Officer Hiam, and Detective Finkel. David testified that, on July 8, 2008, he was present at Baker's residence and observed Carter park his car within 500 feet of Baker's residence and contact her. Officer Hiam testified that he had interviewed Baker at her residence on the night of July 8 after receiving a complaint that Carter had contacted her and that she had appeared nervous and upset. Detective Finkel testified that Carter admitted to her in a telephone conversation that he had in

[5] The statute provides, in full:

> (1) A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.
>
> (2) Assault in the fourth degree is a gross misdemeanor.

RCW 9A.36.041.

fact driven to Baker's residence on July 8. None of the State's witnesses testified about the 1996 or 1997 forms.

After the State presented its case in chief, Carter, through his attorney, moved to dismiss the allegation that he had at least two previous qualifying convictions, contending that insufficient evidence had been introduced to prove the existence thereof. Specifically, Carter contended that the 1996 form was insufficient to establish that he had been previously convicted of violating a no-contact order as required to sustain a felony charge under RCW 26.50.110(5). He maintained that, based on the face of the 1996 form, it was not possible to tell whether he had a qualifying conviction because the form referred to a "violation of the post-sentence court order," cited to the statutory provision for fourth degree assault, and referred to an unidentified additional count that had been dismissed. In light of that ambiguity, Carter argued, a rational trier of fact could not reasonably infer from the 1996 form that he had a previous qualifying conviction.

In response to Carter's motion, the prosecutor represented that other documents related to the 1996 cause but not introduced into evidence indicated that Carter had in fact pleaded guilty to the charge of felony violation of a no-contact order. The prosecutor represented that those documents included a plea agreement form, a presentence report, and a statement of defendant on plea of guilty. However, the State did not move to reopen its case in chief to

introduce those documents into evidence or otherwise submit them to the trial court for review. In addition, the trial court expressly stated that it did not review those documents related to the 1996 cause. Carter's attorney acknowledged that the prosecutor had shown him certain documents related to the 1996 prosecution but maintained that the 1996 judgment and sentence form was, by itself, unclear as to the crime of conviction.

The trial court denied Carter's motion. In explaining the reason for its ruling, the trial court stated that, in its view, Carter had "merged" two motions into one—one pertaining to the sufficiency of the evidence and the other pertaining to the legal question of whether the 1996 judgment and sentence form was applicable to the charged felony count and, hence, admissible. The trial court stated that Carter should have brought the latter motion before the exhibits were admitted and that, by failing to do so, he had effectively waived any challenge to the sufficiency of the 1996 judgment and sentence form to prove a previous qualifying conviction. The trial court further stated that, notwithstanding Carter's failure to make a pretrial motion seeking to exclude from evidence the 1996 judgment and sentence form and despite the form's ambiguity, the form was, nonetheless, sufficient to support a finding that Carter had a previous qualifying conviction.

After the trial court denied Carter's motion, presentation of the evidence resumed. The only witness to testify in Carter's defense was Carter himself. He

admitted that he had driven to Baker's house on July 8 and spoken to her outside of her residence. He also testified that he had signed the 2006 no-contact order when it was issued and was aware of the restrictions that it had imposed but thought that it had expired as of July 8. He also confirmed that he had admitted to Detective Finkel on the telephone that he had visited Baker's residence.

Despite his admissions, Carter maintained that he did not intend to violate the no-contact order. Carter testified that he had driven to Baker's house only to confirm that his 15-year-old daughter was living with Baker. According to Carter's testimony, his daughter, who had been living with him, had run away from his apartment approximately a week and a half before the July 8 incident. Carter testified that he had filed a missing person report, contacted the police about his daughter, and heard from an unspecified source that his daughter might be living at Baker's house. Carter testified that he drove away from Baker's residence after Baker told him that his daughter was "okay." Carter did not testify about any further effort to contact law enforcement authorities or other public agencies concerning his daughter. Nor did he testify about his criminal conviction history.

The jury convicted Carter as charged, and the trial court subsequently sentenced him to 19 months of imprisonment. Carter appeals.

II

Carter asserts that insufficient evidence was admitted at trial to support the jury's verdict of guilt and that his motion to dismiss the charge, brought at the close of the State's case in chief, was improperly denied. We disagree.

In claiming insufficient evidence, Carter argues that exhibit 7, the 1996 judgment and sentence form, must be viewed without relation to other evidence and that, standing alone, it does not support the jury's finding that this was a judgment of guilt for a predicate conviction. The State asserts that, viewing exhibits 6 and 7 together, there is evidence to support a factual determination that exhibit 7 was a judgment and sentence entered upon a finding of guilt for a felony conviction of a no-contact order charge, which would be a predicate conviction. The State's analysis is correct.

When resolving a challenge to the sufficiency of the evidence, we ask whether, "after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990) (citing State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Because credibility determinations are for the trier of fact and are not subject to review, State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Our Supreme Court has previously discussed the role of the trial court in addressing issues related to those raised in this appeal:

> [T]he "existence" of a no-contact order is an element of the crime of violating such an order. However, the "validity" of the no-contact order is a question of law appropriately within the province of the trial court to decide as part of the court's gate-keeping function. The trial judge should not permit an invalid, vague, or otherwise inapplicable no-contact order to be admitted into evidence.

State v. Miller, 156 Wn.2d 23, 24, 123 P.3d 827 (2005).

Moreover, "issues relating to the validity of a court order (such as whether the court granting the order was authorized to do so, whether the order was adequate on its face, and whether the order complied with the underlying statutes) are uniquely within the province of the court." Miller, 156 Wn.2d at 31.

> An order is not applicable to the charged crime if it is not issued by a competent court, is not statutorily sufficient, is vague or inadequate on its face, or otherwise will not support a conviction of violating the order. The court, as part of its gate-keeping function, should determine as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged. Orders that are not applicable to the crime should not be admitted.

Miller, 156 Wn.2d at 31 (footnote omitted).

Following Miller, this court addressed similar issues in State v. Gray, 134 Wn. App. 547, 138 P.3d 1123 (2006), a case in which the defendant claimed that "the statutory authority for the previously-violated NCOs is an essential element of felony violation of an NCO that must be found by the jury." 134 Wn. App. at 549. This court rejected that assertion, holding that "[b]ecause the statutory authority for the previously-violated NCOs dictates whether they are

admissible, it is a question of law for the court in its gatekeeping capacity, not an essential element for the jury." Gray, 134 Wn. App. at 549-50. After Miller, this court held, it was established "that the statutory authority for those NCOs is not an essential element of the crime to be decided by the jury but rather a threshold determination the court makes as part of its 'gate-keeping function' before admitting the prior convictions into evidence for the jury's consideration." Gray, 134 Wn. App. at 556. "[T]he jury found the fact necessary to elevate Gray's crime to a felony: he had two prior convictions for violating NCOs." Gray, 134 Wn. App. at 557.

The same is true here. The conviction memorialized in exhibit 6 is plainly for a predicate offense. Similarly, when viewed together with the entries on exhibit 6, there is evidence that the court order violation memorialized in exhibit 7 was for felony violation of a no-contact order. Although the acronym "FVNCO" is used on exhibit 6, the cause number matches to the cause number on exhibit 7. In this trial, in which testimony, evidence, instructions, and arguments were made concerning "no-contact orders," "violation of no-contact orders," and "felony violation of court orders," it cannot be said that the jurors would be unable to understand the meaning of "FVNCO." This conclusion is in accord with similar conclusions reached in related circumstances. See, e.g., State v. Leach, 113 Wn.2d 679, 691, 782 P.2d 552 (1989) ("DWI" on a citation is sufficient to apprise an ordinary citizen of the crime charged and its elements);

State v. Grant, 104 Wn. App. 715, 719-21, 17 P.3d 674 (2001) ("Driving While Intoxicated" on a citation sufficiently apprises an ordinary citizen of the charged crime and its elements).

Viewing the evidence in the light most favorable to the State, as we must, there was sufficient evidence presented.[6] The verdict is supported by the evidence. The trial court did not err by denying the motion to dismiss or by entering judgment on the verdict.

III

Next, Carter contends for the first time on appeal that the amended information was defective.[7] According to Carter, the State failed to satisfy the constitutional requirement that all essential elements of a charged crime be included in the charging document because the amended information alleged that Carter had at least two previous qualifying convictions only by reciting the language of the criminal statute, without identifying any particular previous convictions. Therefore, Carter contends, the amended information failed to

[6] "No-contact orders," as opposed to some other orders of restraint, can be issued only in proceedings brought pursuant to certain statutes, all of which are among the listed statutes. This satisfies the sufficiency of the evidence claim. Were Carter to have alleged that the underlying no-contact orders were not issued pursuant to one of the listed statutes, he would be challenging their validity, a challenge properly and necessarily addressed to the trial court as an objection to admissibility. This is the lesson of State v. Miller. Carter, of course, makes no such claim.

[7] Generally, we will not consider an issue that was not raised before the trial court. State v. Kennar, 135 Wn. App. 68, 71, 143 P.3d 326 (2006) (citing RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). However, as explained below, because the issue of whether the amended information included the essential elements of the charged offense involves an alleged manifest error affecting Carter's constitutional rights, Carter may raise it for the first time on appeal. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991) (citing State v. Leach, 113 Wn.2d 679, 697, 782 P.2d 552 (1989); State v. Holt, 104 Wn.2d 315, 321, 704 P.2d 1189 (1985); RAP 2.5(a)(3)).

adequately apprise him of the charged felony offense and inhibited him from preparing a defense. We disagree.

Pursuant to both the United States Constitution, U.S. Const. amend. VI, and the Washington Constitution, Wash. Const. art I, § 22, "[a]ll essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). This rule—known as the essential elements rule—"'requires that a charging document *allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged.'" Kjorsvik, 117 Wn.2d at 98 (quoting State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989)). "In an information or complaint for a statutory offense, it is sufficient to charge in the language of the statute if the statute defines the crime sufficiently to apprise an accused person with reasonable certainty of the nature of the accusation." Leach, 113 Wn.2d at 686 (citing State v. Grant, 89 Wn.2d 678, 686, 575 P.2d 210 (1978)); see also Kjorsvik, 117 Wn.2d at 99. However, recitation of statutory language in a charging document is inadequate where the statutory language does not "*define* a charge sufficiently to apprise an accused with reasonable certainty of the nature of the accusation against that person, to the end that the accused may prepare a defense and plead the judgment as a bar to any subsequent prosecution for the same offense." Leach, 113 Wn.2d at 688

(citing State v. Royse, 66 Wn.2d 552, 403 P.2d 838 (1965)).

When reviewing a challenge to the language in a charging document that is raised for the first time on appeal, we engage in a two-part inquiry. Kjorsvik, 117 Wn.2d at 105. First, we examine whether "the necessary facts appear in any form, or by fair construction can they be found, in the charging document." Kjorsvik, 117 Wn.2d at 105. Second, if the necessary facts do appear, we consider whether the defendant can "show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice." Kjorsvik, 117 Wn.2d at 106.

With respect to the first part of this inquiry, our Supreme Court has held that, when charging language is challenged for the first time on appeal, we are to liberally construe the charging language in favor of finding it sufficient. Kjorsvik, 117 Wn.2d at 103. Application of a liberal standard of construction discourages a defendant from engaging in sandbagging, that is, the tactic of waiting to challenge a charging document as defective until after trial because raising the issue beforehand might result in a curative amendment to the charging document. Kjorsvik, 117 Wn.2d at 103. Thus, "[u]nder this rule of liberal construction, even if there is an apparently missing element, it may be able to be fairly implied from the language within the charging document." Kjorsvik, 117 Wn.2d at 104 (citing United States v. Ellsworth, 647 F.2d 957, 962 (9th Cir. 1981)).

With respect to the second part of this inquiry, our Supreme Court has also recognized that a charging document that can be fairly construed as containing all essential elements of the charged offense might nonetheless have actually prejudiced a defendant. Kjorsvik, 117 Wn.2d at 105–06. Thus, "if the [charging] language is vague, an inquiry may be required into whether there was actual prejudice to the defendant." Kjorsvik, 117 Wn.2d at 106. The inquiry into whether there was actual prejudice "affords an added layer of protection to a defendant even where the issue is first raised after verdict or on appeal." Kjorsvik, 117 Wn.2d at 106.

In reviewing the amended information herein filed against Carter, we conclude that it was sufficient to apprise Carter of the crime with which he was charged. It identified the specific charged offense by accusing Carter of having committed "Domestic Violence Felony Violation of a Court Order" and by citing to RCW 26.50.110(1) and (5) as the statutory provisions that Carter had violated. The charging statute provides that "[a] violation of a court order issued under [specific statutes] . . . is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under [the same specific statutes]." RCW 26.50.110(5). Thus, the elements of the charged felony offense are a violation of a court order issued under certain statutes and the existence of two previous qualifying convictions at the time of the charged violation. The charging document specifically alleged that Carter violated the

2006 no-contact order on July 8, 2008, thus apprising him of which order he was alleged to have violated and which conduct constituted the alleged violation. Further, following the language of RCW 26.50.110(5), the amended information alleged that Carter had at least two previous convictions for violating court orders issued under certain statutes. Those statements constitute factual allegations supporting every element of the charged offense.

Carter is incorrect that the recitation of statutory language concerning the element of previous qualifying convictions was defective and that the State was required to identify previous qualifying convictions with particularity. For the proposition that the State was required to do so, Carter mistakenly relies on our decision in City of Seattle v. Termain, 124 Wn. App. 798, 103 P.3d 209 (2004). At issue in Termain was "whether the charging document in a violation of a domestic violence order must identify the order the defendant is alleged to have violated, or at least include sufficient facts to apprise the defendant of his or her actions giving rise to the charge(s)." 124 Wn. App. at 802. Termain was charged with misdemeanor violation of a no-contact order. The charging document in Termain recited the language of the municipal ordinance that Termain had allegedly violated; it did not also allege facts specifically identifying the no-contact order that he had allegedly violated. 124 Wn. App. at 800–01. We explained that recitation of the ordinance language in that context was insufficient to apprise Termain of the charged offense and that further

allegations identifying a specific order or the conduct giving rise to the charge was necessary because the offense of violation of a domestic violence no-contact order necessarily involves a particular court order and a particular person protected by the order. Termain, 124 Wn. App. at 805. Therefore, we held, "identification of the specific no-contact order, the issuance date from a specific court, the name of the protected person, or sufficient other facts must be included in some manner" in the charging document. Termain, 124 Wn. App. at 805.

However, in alleging that an individual has at least two previous convictions qualifying him or her for conviction of felony violation of a no-contact order pursuant to RCW 26.50.110(5), recitation of the statutory language is sufficient to apprise the defendant of the charged offense. Although the offense of violation of a no-contact order necessarily involves a particular no-contact order and a particular, protected individual, the enhancement of this offense from a gross misdemeanor to a class C felony pursuant to RCW 26.50.110(5) does not depend on the existence of a particular previous conviction. To the extent that the enhancement depends on a specific predicate act, an offender must have at least two previous convictions for violating orders issued under the specific listed statutes. Other than the statutory basis and the applicability of an offender's previous convictions to the felony violation charge, the specific circumstances surrounding such previous convictions are immaterial to

establishing the element essential to the charged felony offense.

The amended information herein at issue included the essential elements of the offense with which Carter was charged. It alleged that Carter violated the 2006 no-contact order, in satisfaction of the pleading requirement that we articulated in Termain. Further, it alleged that he had at least two previous convictions for violating court orders issued under specifically identified statutes, in conformance with the language of RCW 26.50.110(5). By tracking the statutory language, the amended information did not leave Carter to guess at the crime he was alleged to have committed. Cf. Termain, 124 Wn. App. at 806. It notified Carter that the State was alleging that he had at least two previous convictions for violating orders issued under specific statutes. Whether Carter had at least two previous qualifying convictions was a matter of his criminal history. He either had such convictions in his history or he did not. Thus, it is unlike the situation in Termain, where the defendant was left to guess which court order he was alleged to have violated, and correspondingly, which conduct constituted such a violation.

Carter's contention that he suffered actual prejudice from the language used in the charging document also fails. He asserts that he suffered prejudice because he was unable to ascertain which previous convictions the State planned to rely upon to establish the elements essential to the felony enhancement. However, as we explained above, the State was not required to

identify particular previous convictions in the charging document. It identified the specific order and date of the conduct underlying the charge that he violated a no-contact order and alleged that he had previous qualifying convictions. There was nothing vague or inartful about the language used in the charging document. As the charging document both included the essential elements of the charged offense and alleged facts notifying Carter of the charged crime, he could not have suffered any prejudice because of insufficient notice. See Kjorsvik, 117 Wn.2d at 110–11.

That is not to say that the particular previous convictions on which the State planned to rely were insignificant to Carter's defense. Indeed, if Carter could have shown that a previous conviction was invalid, such a conviction would not support the felony charge. However, the proper mechanism for Carter to have obtained information about particular previous convictions would have been to request a bill of particulars from the State. See State v. Eaton, 164 Wn.2d 461, 470 n. 6, 191 P.3d 1270 (2008) (J.M. Johnson, J., concurring); State v. Holt, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985). Carter did not make such a request. He cannot establish prejudice as a result of his failure to do so. Holt, 104 Wn.2d at 320 (citing State v. Bonds, 98 Wn.2d 1, 16, 653 P.2d 1024 (1982)). Accordingly, we conclude that the amended information sufficiently apprised Carter of the charged offense so as to allow him to prepare a defense. The amended information was not defective.

IV

Finally, Carter contends that his lawyer was ineffective for various reasons. Again, we disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance (1) was deficient and (2) prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is that which falls below an objective standard of reasonableness. In re Det. of Moore, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009) (citing State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997)). Prejudice occurs where there is a reasonable probability that, but for the deficient performance, the outcome of the trial would have been different. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). It is unnecessary for us to address both prongs of the Strickland test if the defendant makes an inadequate showing as to either prong. State v. Standifer, 48 Wn. App. 121, 126, 737 P.2d 1308 (1987) (citing Strickland, 466 U.S. at 697).

First, Carter contends that his lawyer was deficient for failing to object to the admission of the 1997 judgment and sentence form and for failing to enter into a stipulation that Carter had a previous qualifying conviction in order to prevent the jury from seeing the 1997 judgment and sentence form. Carter contends that he suffered prejudice as a result of the 1997 judgment and sentence form's introduction into evidence because the form indicated that

Carter had been previously convicted of felony violation of a no-contact order—the same offense with which he was charged in this case. Therefore, he asserts, it is possible that the jury convicted him based on a conclusion that he had a propensity to commit the charged offense, not based on evidence that he actually committed the charged offense.

Even if Carter's lawyer was deficient in the manner that Carter contends, however, Carter has not shown that he suffered actual prejudice. "The prejudice prong of a claim of ineffective assistance of counsel compares well to a harmless error analysis—essentially 'no harm, no foul.'" State v. Rodriguez, 121 Wn. App. 180, 187, 87 P.3d 1201 (2004) (quoting State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999)). If Carter's attorney committed an error, it was harmless. Carter admitted in his testimony at trial that he visited Baker's residence on the night in question, contrary to the terms of the 2006 no-contact order. Therefore, his own testimony established that that he committed the charged crime. Carter did not receive ineffective assistance of counsel in this regard.

Moreover, it is clear that Carter's attorney's strategy was to avoid calling attention to perceived inadequacies in the State's proof and to seek to capitalize on these inadequacies by moving to dismiss after the State rested its case in chief. By so acting, Carter's counsel sought to deprive the State of the opportunity to correct the deficiencies the defense believed existed. A claim of

ineffective assistance of counsel cannot be predicated upon such a strategic decision. State v. Hassan, 151 Wn. App. 209, 218, 211 P.3d 441 (2009).

Carter additionally claims that his attorney erred by (1) not seeking a stipulation as to his criminal history and (2) not seeking to redact portions of exhibit 6, the 1997 judgment and sentence form. This claim fails because (1) there is no evidence that the State would have agreed to enter into a stipulation beneficial to Carter and the request for such may have undermined the defense strategy of "surprising" the State, and (2) there is no reason to believe that the State would have agreed to—or the trial court ordered—the redaction of entries in a judgment and sentence form necessary to the proof of an element of the charged offense. Moreover, arguing about the prejudicial effect of such entries may also have tended to "tip off" the prosecutor as to the defense strategy of "surprise." Thus, defense counsel's actions can, in this regard also, be seen as strategic in nature, and thus not of a type that can support an ineffective assistance claim.

Carter next contends that his lawyer was ineffective for failing to object to the admissibility of the 1996 judgment and sentence form. There is a strong presumption that counsel provided effective assistance and "made all significant decisions in the exercise of reasonable professional judgment." State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). If defense counsel's conduct can be characterized as a legitimate trial strategy or tactic, it does not constitute

deficient performance. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). A decision not to object to proffered evidence can constitute "a valid tactical decision, and cannot provide the basis for an ineffective assistance claim." State v. Alvarado, 89 Wn. App. 543, 553, 949 P.2d 831 (1998). As explained above, the 1996 judgment and sentence form was admissible as relevant to establishing the existence of a previous conviction, and it established a sufficient evidentiary basis for the jury to find that Carter had been previously convicted of violating a court order. Thus, Carter has not shown that any interposed objection would have been sustained. Hence, Carter has failed to show that his lawyer rendered ineffective assistance by not objecting to the admission of the 1996 judgment and sentence form.

Carter also contends that his lawyer was ineffective for failing to request an instruction on the affirmative defense of necessity. Again, he has not shown that his lawyer's performance was deficient. Although a defendant is entitled to have the jury instructed on his or her theory of the case, a defendant is not entitled to an instruction that misrepresents the law or for which there is no evidentiary support. State v. Garbaccio, 151 Wn. App. 716, 737, 214 P.3d 168 (2009) (quoting State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994)), review denied, 168 Wn.2d 1010 (2010). The affirmative defense of necessity is available

> "when the physical forces of nature or the pressure of circumstances cause the accused to take unlawful action to avoid a harm which social policy deems greater than the harm resulting

> from a violation of the law. The defense is not applicable where the compelling circumstances have been brought about by the accused or where a legal alternative is available to the accused."

State v. Gallegos, 73 Wn. App. 644, 650, 871 P.2d 621 (1994) (quoting State v. Diana, 24 Wn. App. 908, 913–14, 604 P.2d 1312 (1979)). The evidence introduced at trial did not warrant a necessity instruction. Carter might have been worried about the welfare of his daughter, but natural physical forces did not require him to violate the no-contact order. He could have asked either a third party or a law enforcement official to investigate his daughter's well being. His lawyer was not ineffective.

Affirmed.

Dwyer, C. J.

We concur:

Ellington, J.

Grosse, J.